



30 June 2022

To: The Nepal Supreme Court

Regarding: Expert Opinion Statement in the case of Rukshana Kapali v Government Nepal et al.

I am a Senior Campaigns Officer at Privacy International. Privacy International was established in 1990 as non-profit, non-governmental organisation based in London although its work is global.

I have been involved in delivering PI's work on identity systems, working alongside an interdisciplinary team of researchers, technologists, and policy advisors. As part of this, I have both conducted research and delivered trainings on identity systems and their implications for the right to privacy, as well as supported research conducted by our partner organisations around the world. Part of my work in this area has been to research and document the implications of identity systems on communities at risk including transgender people. I hold a BA (Hons) in Politics, Philosophy, and Economics from the University of Lancaster and an MSc in social and political theory from Birkbeck, University of London.

In this submission, please find:

1. The expert opinion by Caitlin Bishop, Campaigns Officer

Yours sincerely,

Caitlin Bishop

Senior Campaigns Officer, Privacy International

caitlinb@privacyinternational.org



1. INTRODUCTION

1. Privacy International (“PI”) works at the intersection of modern technologies and rights. It exposes harms and abuses, mobilises allies globally, campaigns with the public for solutions, and pressures companies and governments to change.
2. PI believes that privacy is essential to the protection of autonomy and human dignity, serving as the foundation upon which other human rights are built. Within its range of activities, PI investigates how peoples’ personal data is generated and exploited, and how it can be protected through legal and technological frameworks.
3. One area of PI’s work focuses on ID systems. Among other work, PI has co-developed a global litigation guide for ID systems in partnership with the Harvard Law School’s International Human Rights Clinic.¹ In all of its work, Privacy International draws from the expertise of partner civil society organisations around the globe in Africa, Latin America, Europe, Middle East, and Asia.
4. As a result, PI is at the centre of a global network critically engaging with ID systems, and is a source of research, educational resources, and analysis. On numerous occasions PI has been called as an expert on identity and digital identity issues by the UK government, and entities such as the Council of Europe’s Committee of Convention 108, the United Nations Office of the High Commissioner for Human Rights (OHCHR) as well as the United Nations Special Rapporteurs on extreme poverty and human rights and on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Further, PI has provided expert witness statements in legal proceedings highlighting the exclusionary impact of ID systems in Kenya and Uganda on refugees and elderly people, respectively.²

2.1 THE RIGHT TO PRIVACY AS AFFECTED BY IDENTITY SYSTEMS

The concept of informational privacy

5. The right to privacy is a fundamental right enshrined in many constitutions around the world, as well as in international human rights law, including Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, to which Nepal is a state party. The right to privacy is also enshrined in various other regional human rights instruments, including the European Convention on Human Rights, the American Convention on Human Rights, the Arab Charter on Human rights, and the Association of Southeast Asian Nations Human Rights Declaration. Furthermore, at a national level over 130 countries have constitutional statements regarding the protection of privacy as does Nepal under Article 29 of its Constitution.³

¹ Privacy International, A Guide to Litigating Identity Systems, September 2019. Available at:

<https://privacyinternational.org/learning-resources/guide-litigating-identity-systems>

² Privacy International, Haki na Sheria v. The Attorney General. Available at: <https://privacyinternational.org/legal-action/haki-na-sheria-v-attorney-general-kenya>; ISER & Others v Attorney General of Uganda. Available at:

<https://privacyinternational.org/legal-action/iser-others-v-attorney-general-uganda-another>

³ Constitution of Nepal, 2015



6. Privacy establishes boundaries to limit who has access to our bodies, places and things, as well as our communications and our information.⁴ The right to privacy is conceived differently in many national contexts, but it can include such themes as physical privacy, informational privacy, and autonomy.⁵
7. A key dimension of the right to privacy is the protection of individuals' data. As early as 1988, the UN Human Rights Committee recognised the need for data protection laws to safeguard the fundamental right to privacy.⁶ In 2011, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression issued a report similarly noting that *"the protection of personal data represents a special form of respect for the right to privacy."*⁷ In 2018, the UN High Commissioner for Human Rights noted that *"there is a growing global consensus on minimum standards that should govern the processing of personal data by States, business enterprises and other private actors."*⁸
8. Over 120 countries around the world have data protection laws in place to oversee the effective protection of people's rights and their data.⁹ Nepal's Individual Privacy Act, refers to the right to privacy as follows: *"Every person shall have the right to maintain the privacy of the matters such as biological or biometric identity, gender identity, sexuality, sexual relation, conception or abortion, virginity, potency, impotency or physical illness related to his or her personal life."*¹⁰

The right to privacy and identity systems

9. Government identity systems ("ID systems") are, by their very nature, standardised and large-scale mechanisms by which governments process personal data. Accordingly, many of the activities which are core to the functioning of modern government-proposed ID systems – such as mandatory taking and recording of personal data – constitute an interference with the right to privacy.
10. Specifically, such measures may interfere with a person's informational privacy, a concept endorsed by Indian and Kenyan courts, understood as encompassing the right of control a person has over their personal information.¹¹

⁴ Privacy International, What is Privacy? Available at: <https://privacyinternational.org/explainer/56/what-privacy>

⁵ See: *Madhewoo v. The State of Mauritius and Anor*, 2015 SCJ 177 [hereafter "Madhewoo judgment"], at para. 23; Justice K.S. Puttaswamy and Another v. Union of India and Others, Writ Petition (Civil) No. 494 of 2012 & connected matters [hereafter "Aadhaar judgment"], para. 29 of dissent; Opinion of Justice Sykes, para. 174.

⁶ UN HRC, General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, para. 10. Available at: <https://www.refworld.org/docid/453883f922.html>

⁷ UN Special Rapporteur, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, para. 58. Available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf

⁸ Report of the UN High Commissioner for Human rights, Right to privacy in the digital age, A/HRC/39/29, para. 28. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/29

⁹ Banisar, David, National Comprehensive Data Protection/Privacy Laws and Bills 2021, 30 August 2021. Available at SSRN: <https://ssrn.com/abstract=1951416>

¹⁰ The Privacy Act, 2075 (2018) under Chapter 2 Section 3 (3). Available at: <https://www.lawcommission.gov.np/en/wp-content/uploads/2019/07/The-Privacy-Act-2075-2018.pdf>

¹¹ Aadhaar judgment, para. 83 at 164; Nubian Rights Forum and Others v. The Hon. Attorney General, Consolidated Petitions No. 56, 58 and 59 of 2019 [hereafter "Huduma Namba judgment"], para. 750.



11. The processing of any personal data by the state, including the implementation of an ID system, must be carried out with respect for the right to privacy and other fundamental human rights. The UN Human Rights Council has called upon States “to take appropriate measures to ensure that digital or biometric identity programmes are designed, implemented and operated with appropriate legal and technical safeguards in place and in full compliance with human rights law”.¹²

2.2 THE IMPLICATIONS ON OTHER FUNDAMENTAL RIGHTS AND FREEDOMS

12. While privacy and data protection issues are central concerns in the implementation of ID systems,¹³ as registration in these ID systems are demanded to access an increasingly wide range of goods and services, they affect the exercise of a range of human rights.
13. Where provision of an ID, i.e. when one has to show proof of who they say they are, is made a requirement to access services, ID systems will similarly engage economic, social and cultural rights.
14. The potential for exclusion has been highlighted by human rights expert bodies. As recognised by the UN Secretary General in his report on the role of new technologies for the realisation of economic, social and cultural rights: *“One major concern linked to comprehensive digital identification systems is that these systems can themselves be sources of exclusion, contrary to their purpose.”*¹⁴ He added that: *“...not being able to prove one’s identity can severely inhibit, and even effectively block, access to essential services, including housing, social security, banking, health care and telecommunications”*.¹⁵
15. Courts in various jurisdictions including in Jamaica, Kenya and India have explored in their judgements how identity systems can lead to discrimination between different groups of persons, particularly in the absence of a strong legal framework. These judgments have highlighted that identity systems may also disproportionately impact the rights of marginalised and vulnerable people, compounding and multiplying factors of exclusion and they can lead to the perpetuation of pre-existing inequalities and injustices.¹⁶
16. People are being excluded from accessing some public services as the result of not having a digital ID, because of discriminatory applications, technical or logistical barriers, or enrolment

¹² UN General Assembly Resolution on the Right to Privacy in the Digital Age, A/HRC/RES/42/15, para. 6(m). Available at: https://ap.ohchr.org/Documents/dpage_e.aspx?si=A/HRC/RES/42/15

¹³ Privacy International, *A Guide to Litigating Identity Systems*, September 2019. Available at: <https://privacyinternational.org/learning-resources/guide-litigating-identity-systems>

¹⁴ United Nations Secretary General, Report on the role of new technologies for the realization of economic, social and cultural rights, A/HRC/43/29, para. 33. Available at: <https://www.ohchr.org/en/documents/reports/ahrc4329-report-role-new-technologies-realization-economic-social-and-cultural>

¹⁵ Ibid, para. 30

¹⁶ Privacy International, *A Guide to Litigating Identity Systems*, September 2019. Available at: <https://privacyinternational.org/learning-resources/guide-litigating-identity-systems>



and verification not being possible. As research in Chile,¹⁷ Uganda,¹⁸ and India¹⁹ has shown, they leave people unable to exercise their rights to social security, education and healthcare including some of the most marginalised people. Further, as Privacy International's dedicated research on the subject has shown, exclusion is also likely to happen if someone ends up with an ID that they are not able to make use of e.g. if the gender marker used on ID is different from their gender or does not match their gender identity or expression.²⁰

17. To the extent that it is often those who are already in precarious socio-economic conditions – such as women, the elderly, asylum-seekers, refugees and stateless persons – who are excluded from accessing ID because of legal, technical or administrative barriers, questions of discrimination on the basis of sex, age, national or social origin may reasonably arise. Discriminatory effects on access to public services described above can violate international human rights law. The International Covenant on Economic, Social and Cultural Rights imposes an obligation on State parties to guarantee the rights contained therein “*without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”.²¹
18. The imperative to pre-empt and monitor any emerging discrimination resulting from ID systems is incumbent both upon public bodies, private actors, and other third parties. The UN Secretary General has explicitly recommended “*to integrate ongoing human rights due diligence and broad consultations into the process of developing and deploying comprehensive nationwide digital identification systems, in order to enable the identification and mitigation of human rights risks associated with the systems*”.²²

2.3 THE IMPACT ON TRANSGENDER, GENDER DIVERSE AND INTERSEX PERSONS

19. In this submission, the term “transgender” is used to describe persons who identify with a different sex than the one assigned to them at birth;²³ “gender-diverse” is used to refer to persons whose gender identity, including their gender expression, is at odds with what is perceived as being the gender norm in a particular context at a particular point in time, including those who do not place themselves in the male/female binary;²⁴ and Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do

¹⁷ Privacy International, *Exclusion and identity: life without ID*, 14 December 2018. Available at: <https://privacyinternational.org/long-read/2544/exclusion-and-identity-life-without-id>

¹⁸ Center for Human Rights and Global Justice, Initiative for Social and Economic Rights, and Unwanted Witness, *Chased Away and Left to Die*, June 2021. Available at: <https://chrgi.org/wp-content/uploads/2021/06/CHRGJ-Report-Chased-Away-and-Left-to-Die.pdf>

¹⁹ Privacy International, *Exclusion by design: how national ID systems make social protection inaccessible to vulnerable populations*, 29 March 2019. Available at: <https://privacyinternational.org/long-read/4472/exclusion-design-how-national-id-systems-make-social-protection-inaccessible>

²⁰ Privacy International, *My ID, my identity? The impact of ID systems on transgender people in Argentina, France and the Philippines*, 15 January 2021. Available at: <https://privacyinternational.org/long-read/4372/my-id-my-identity-impact-id-systems-transgender-people-argentina-france-and>

²¹ International Covenant on Economic, Social and Cultural Rights, Art. 2(2).

²² United Nations Secretary General, Report on the role of new technologies for the realization of economic, social and cultural rights, A/HRC/43/29, para. 51. Available at: <https://www.ohchr.org/en/documents/reports/ahrc4329-report-role-new-technologies-realization-economic-social-and-cultural>

²³ United Nations Independent Expert on sexual orientation and gender identity, The struggle of trans and gender-diverse persons. Available at: <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons>

²⁴ Ibid



not fit typical binary notions of male or female bodies.²⁵

20. The experience of transgender, gender diverse and intersex persons with identity systems highlight that the issue of exclusion, when it comes to identity systems, is not only an issue of whether an individual is able to get the necessary ID card or not: an individual can have an ID card but still suffer from exclusion. This could be, for example, when an ID document has inaccurate information, and cannot be easily corrected by the individual concerned. This means that those affected can face major obstacles in making use of these documents.

The lack of flexibility in identity systems

21. A key finding which has emerged from our research in this area is that the lack of flexibility in current registration and identification systems means that people all over the world face barriers to enjoy their right to self-determination because of legal, administrative, and societal challenges which effectively prevent them from being recognised by their actual gender identity.²⁶
22. Gender is a key – and often mandatory - data field at the stage of registration/enrolment, and has implications at various steps of a person's engagement with identity systems, including: identification, i.e. when a person provides their information such as when they register for a service; authentication, i.e. when a systems checks if they are interacting with a person who exists; and verification, i.e. when the systems needs to determine whether the person themselves is conducting the transaction. However, these gender/sex markers can be difficult, if not impossible, to change and can be a factor which enables harassment and creates a significant risk surface for trans people whose gender identity or expression doesn't match the gender on their ID. Additionally, any such mismatch can impede trans people's access to services and their safe and equal enjoyment of rights because of legal barriers, stigma, violence and discriminatory policies and practices.²⁷
23. In recognition of the risks faced by trans people, issues attaching to the official recognition of their gender identity or expression have been increasingly flagged by human rights monitoring bodies. The UN High Commissioner for Human Rights has raised concerns about the inability for transgender people *"to obtain legal recognition of their preferred gender, including a change in recorded sex and first name on State-issued identity documents."*²⁸ The Secretary General of the United Nations has similarly noted: *"Difficulties also arise when the name and gender in identity documentation are not properly reflected in the identity system, exposing people with non-*

²⁵ United Nations Office of the High Commissioner for Human Rights, Intersex People, OHCHR and the human rights of LGBTI people. Available at: <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people>

²⁶ Privacy International, *My ID, my identity? The impact of ID systems on transgender people in Argentina, France and the Philippines*, 15 January 2021. Available at: <https://privacyinternational.org/long-read/4372/my-id-my-identity-impact-id-systems-transgender-people-argentina-france-and>

²⁷ UN General Assembly, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/73/152. Available at: https://ap.ohchr.org/Documents/dpage_e.aspx?si=A/73/152; Privacy International, *My ID, My Identity? The Impact of ID Systems on Transgender People in Argentina, France and the Philippines*. Available at: <https://privacyinternational.org/long-read/4372/my-id-my-identity-impact-id-systems-transgender-people-argentina-france-and>;

²⁸ Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23, para. 69. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/23



binary gender identity to particular risks.”²⁹ The United Nations Independent Expert on sexual orientation and gender identity noted that trans people “are particularly vulnerable to human rights violations when their name and sex details in official documents do not match their gender identity or expression.”³⁰ He further recommended that trans people be legally recognised, including their right to have their gender identity and, in some cases, their changed name (if applicable) reflected in identity documents.³¹

24. Further, the recognition of gender identity by government has been acknowledged by the Inter-American Court of Human Rights and the United Nations’ Office of the United Nations High Commissioner for Human Rights as being essential to ensure the enjoyment of all human rights by transgender people including protection from violence, torture, ill-treatment, the right to health, education, employment, housing, access to social security, and freedom of expression and association.³² As a thematic report by the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity highlighted, human rights violations can occur when the names and sex details of individuals in official documents do not match their gender identity or expression. This includes arrest, harassment, abuse, violence and extortion, exclusion from school and the formal labour market, barriers in access to services such as housing, healthcare, and emergency care, and services in times of crisis.³³
25. The hurdles identified by human rights monitoring bodies align with PI’s findings. In 2021, PI conducted research on trans people, looking specifically at the legal frameworks in the Philippines, Argentina and France.³⁴ As this research confirmed, trans people face particular issues because their ID documents do not reflect how they present their gender identity. Some of the concerns documented included the inability to access services which require an identity document, such as healthcare in the Philippines. The barrier exists when the gender indicated on the identity document provided does not match the person’s gender identity. In other instances, the excessive length of time involved in receiving updated documentation reflecting

²⁹ United Nations Secretary General, Report on the role of new technologies for the realization of economic, social and cultural rights, A/HRC/43/29, para. 33. Available at: <https://www.ohchr.org/en/documents/reports/ahrc4329-report-role-new-technologies-realization-economic-social-and-cultural>

³⁰ United Nations Independent Expert on sexual orientation and gender identity, The struggle of trans and gender-diverse persons. Available at: <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons>

³¹ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/73/152, para. 18. Available at: https://ap.ohchr.org/Documents/dpage_e.aspx?si=A/73/152

³² Inter-American Court of Human Rights, advisory opinion OC-24/17, 24 November 2017. Available at: https://corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf, para. 98; United Nations, Office of the United Nations High Commissioner for Human Rights, Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, New York and Geneva, 2016, HR/PUB/16/3, para. 94. Available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/LivingFreeAndEqual.pdf>

³³ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Report on socio-cultural and economic inclusion of LGBT people, General Assembly at its 74th session, a/74/181. Available at: <https://www.ohchr.org/en/documents/thematic-reports/report-socio-cultural-and-economic-inclusion-lgbt-people>; Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN General Assembly, A/73/152, para 12

³⁴ Privacy International, *My ID, my identity? The impact of ID systems on transgender people in Argentina, France and the Philippines*, 15 January 2021. Available at: <https://privacyinternational.org/long-read/4372/my-id-my-identity-impact-id-systems-transgender-people-argentina-france-and>



the accurate gender marker can be add to the administrative hurdles faced by trans people, as reported in France.³⁵

26. During the Covid-19 pandemic we saw further instances where the imposition of strict ID requirements could lead to further discrimination of transgender people for example with the gendered lockdown measures proposed in several countries including Panama³⁶ and Colombia.³⁷
27. Specifically, within an education setting, the Council of Europe adopted a set of recommendations on measures to combat discrimination on grounds of sexual orientation or gender identity indicating that in addition to having a responsible to ensure such a procedure is in place, *“member States should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificate”* to guarantees full legal recognition in all areas of life.³⁸

Right to self-determination

28. The rigidity of ID systems and the resulting failure to accommodate changes to gender identity have a distinct impact on trans people’s right to self-determination. The link between gender identity and self-determination has been explained by the Inter-American Court of Human Rights³⁹ in the following terms: ⁴⁰ “Regarding gender and sexual identity, the Court reiterates that this is also linked to the concept of liberty and to the possibility of all human beings for self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own convictions, as well as the right to protection of their privacy (supra para. 87).”⁴¹ In a similar vein, the United Nations High Commissioner for Human Rights and other treaty bodies have recommended that Member States should issue legal identity documents that reflect the gender of the person concerned based on the right to self-determination.⁴²

Global developments

³⁵ See: Case Study 2. France “When your ID does not match your identity, you end up at the mercy of everyone you interact you with: your employer, your professors, your landlord...”. Available at: <https://privacyinternational.org/long-read/4372/my-id-my-identity-impact-id-systems-transgender-people-argentina-france-and>

³⁶ Hannah Summers, Panama’s trans community failed by gendered lockdown measures – report, The Guardian, 30 September 2020. Available at: <https://www.theguardian.com/global-development/2020/sep/30/panamas-trans-community-failed-by-gendered-lockdown-measures-report>

³⁷ Jo Griffin and Daniella Riviera Antara, ‘Separation by sex’: gendered lockdown fuelling hate crime on streets of Bogotá. The Guardian. Available at: <https://www.theguardian.com/global-development/2020/may/08/separation-by-sex-gendered-lockdown-fuelling-hate-on-streets-of-bogota>

³⁸ Recommendation CM/Rec (2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity. Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1606669>.

³⁹ Inter-American Court of Human Rights, advisory opinion OC-24/17, 24 November 2017. Available at: https://corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf

⁴⁰ Cf. Case of Atala Rizzo and daughters v. Chile. Merits, reparations and costs, para. 141.

⁴¹ Inter-American Court of Human Rights, advisory opinion OC-24/17, 24 November 2017. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/220/41/PDF/N1822041.pdf?OpenElement>, para. 93

⁴² Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23, para. 79 (i). Available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc2923-discrimination-and-violence-against-individuals-based-their>



29. The negative implications of ID systems for transgender, gender diverse and intersex persons is gaining recognition and over the years some governments around the world have taken measures to tackle these issues and protect the rights of this community.
30. In countries like Argentina and Uruguay, recent laws have been passed to facilitate transitioning processes. Trans people only need to request the correction of their gender and provide the name they wish to use to the relevant administrative body and their birth certificate and IDs will be automatically corrected.⁴³

2.4 THE USE OF A DEADNAME AND ITS IMPLICATIONS

31. As part of transitioning, many transgender people change their names.⁴⁴ According to a 2015 US survey of trans people, thirty percent change their name to more accurately reflect their gender.⁴⁵ Their old name is often called a 'deadname'. A transgender person's deadname is tied to a gender and an identity which is not the trans person's own.
32. The persistent use of a transgender person's 'deadname' is a form of misgendering in which others refuse to accept or recognise a transgender person's actual gender. Misgendering can trigger or exacerbate gender dysphoria,⁴⁶ a condition defined by the American Psychology Association (APA) in the Diagnostic and Statistical Manual of Mental Disorders as "a condition in which a person has marked incongruence between the expressed or experienced gender and the biological sex at birth".⁴⁷ Gender dysphoria has negative effects on the concerned individual's health, as it "causes clinically significant distress or impairment in social, occupational or other important areas of functioning".⁴⁸ Independently from whether someone suffers from gender dysphoria, the use of a trans person's deadname has been shown to increase the likelihood of suicidal thoughts and attempts.⁴⁹ Conversely, the use of a trans

⁴³ Article 4, Argentinean Law 26.743 on Gender Identity, available at : https://www.buenosaires.gob.ar/sites/gcaba/files/ley_26.743_de_identidad_de_genero.pdf; Article 3, Uruguayan Law No. 18620 on the right to gender identity, available at: <http://www.impo.com.uy/bases/leyes-originales/18620-2009>

⁴⁴ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality. Available at: <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

⁴⁵ Dan Stahl, Making a name for yourself: For trans people, it's 'life-changing', 6 September 2019, NBC News. Available at: <https://www.nbcnews.com/feature/nbc-out/making-name-yourself-trans-people-it-s-life-changing-n1049721>; James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality. Available at: <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

⁴⁶ Sam Riedel, Deadnaming A Trans Person Is Violence — So Why Does The Media Do It Anyway? 6 March 2017. Available at: <https://medium.com/the-establishment/deadnaming-a-trans-person-is-violence-so-why-does-the-media-do-it-anyway-19500eda4b4>

⁴⁷ Kaltiala-Heino R, Bergman H, Työläjäarvi M, Frisén L. Gender dysphoria in adolescence: current perspectives. *Adolesc Health Med Ther*. 2018 Mar 2;9:31-41. doi: 10.2147/AHMT.S135432. PMID: 29535563; PMCID: PMC5841333. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5841333/>

⁴⁸ *Adolesc Health Med Ther*. 2018 Mar 2;9:31-41. doi: 10.2147/AHMT.S135432. PMID: 29535563; PMCID: PMC5841333. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5841333/>

⁴⁹ Herman, J.D., Brown, T.N.T., and Haas, A. P., Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey, September 2019. Available at: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>



person's chosen name has been shown to result in fewer depressive symptoms and less suicidal ideation and behaviour.⁵⁰

33. In data protection terms, openly deadnaming a trans person can amount to a disclosure of personal data insofar as it reveals the gender transition.⁵¹ That disclosure can occur through the juxtaposition of the former and current names, particularly when those names can be perceived as feminine or masculine; or through juxtaposition with their gender expression, addressing a person by their former name when that name, whether by connotation or implication, is at odds with their gender presentation.

Privacy Implications

34. Sharing a person's deadname without their consent amounts to an interference with their privacy.
35. Nepalese law explicitly provides for gender identity as a category of personal data, alongside other data categories which are commonly recognised as sensitive, such as biological and biometric identity. In relation to gender identity specifically, the Privacy Act, 2075 (2018), makes clear that "No person shall publish, or cause to be published, any matters [such as gender identity] which are related to any person so as to affect, inflict or insult in the personal life of such a person, by writing, speaking, publishing or using electronic means or any other manner".⁵²
36. International rights frameworks and jurisprudence similarly address the unique nature of gender identity data. Disclosing a person's deadname or the fact they even have a deadname may reveal the fact that a person has changed their gender identity. In recognition of the potential consequences attaching to the unwanted disclosures relating to gender identity, the Yogyakarta Principles, cited in the seminal *Pant v. Nepal* judgement⁵³, clearly state that: "[e]veryone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, [... which] includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity [...]".⁵⁴ Further, the European Court of Human Rights' Guide on Data Protection jurisprudence identifies data revealing sexual identification as sensitive data.⁵⁵
37. Domestic courts are similarly moving towards an increasing recognition of the risks attaching to the disclosure of trans people's former gender identity. For example, the Mexico Supreme Court

⁵⁰ Russell ST, Pollitt AM, Li G, Grossman AH. Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth. *J Adolesc Health*. 2018 Oct;63(4):503-505. doi: 10.1016/j.jadohealth.2018.02.003. Epub 2018 Mar 30. PMID: 29609917; PMCID: PMC6165713. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6165713/>

⁵¹ Inter-American Court of Human Rights, advisory opinion OC-24/17, 24 November 2017, page 182. Available at: https://corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf

⁵² The Privacy Act, 2075 (2018)

⁵³ *Sunil Babu Pant and Others/ v. Nepal Government and Others*, Supreme Court of Nepal (21 December 2007, Note: Summary based on translation published in *National Judicial Academy Law Journal*, 2 *NJA Law Journal* 2008, pp. 261-286. Available at: <https://www.icj.org/sogicasebook/sunil-babu-pant-and-others-v-nepal-government-and-others-supreme-court-of-nepal-21-december-2007/>

⁵⁴ See: <https://yogyakartaprinciples.org/principle-6/>

⁵⁵ European Court of Human Rights, Guide on Data Protection, para. 34. Available at: https://www.echr.coe.int/Documents/Guide_Data_protection_ENG.pdf



has ruled that in the case of individuals who have changed their gender identity, if “the data concerning the name and sex with which they were originally registered at birth” is retained “in their documents, including the birth certificate [...] the resulting disclosure of such personal data would violate their fundamental rights to human dignity, equality and non-discrimination, privacy, [...] because [...] in even the most simple activities of their lives, these persons must reveal their previous condition, possibly giving rise to discriminatory acts towards them, without there being any reason to burden them in this way. [...]”⁵⁶

38. Other human rights monitoring bodies have cautioned against the potential privacy risks attaching to the disclosure of information relevant to gender identity data. Although acknowledging that the manner in which data regarding identity is recorded is crucial to enjoyment of fundamental rights, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity noted that: *“Legal systems must, on an ongoing basis, carefully review the reasoning behind the gathering and exhibition of certain data, and the rules governing data management, which must include separate considerations for the need to gather and the need to exhibit.”* He also questioned the *“real need for the pervasive exhibition of gender markers in official and non-official documentation”* adding that *“[t]he simple principle remains that States must refrain from gathering and exhibiting data without a legitimate, proportionate and necessary purpose.”*⁵⁷
39. The impact of the disclosure of some types of personal information is a relevant factor to consider when assessing the degree of interference with the right to privacy. For example, the European Court of Human Rights has previously taken into account impacts that the disclosure of information could have on claimant’s private and family life, as well their social and employment situation.⁵⁸
40. In situations where a person has changed their name and gender identity there is a question on the need for their deadname to be known and disclosed after a person’s name and gender identity have been changed. The continued use of a deadname has been reported in a study by the European Commission as creating situations of anxiety and a person feeling unsafe or uncomfortable with their deadname being known especially as knowledge of the existence of a deadname reveals that a person changed their gender identity.⁵⁹ This sort of disclosure will rarely be warranted, except for situations where past data may be reasonably required, for example for an identity check.⁶⁰
41. The question of impact of unwanted disclosures in connection to a trans person’s gender identity is particularly important given the societal perceptions and ongoing stigma attached to transgender people and the wider LGBTQ+ community. As recently as 2019, one survey of LGBTQ+ people in Kathmandu found that 33% were bullied, 80.5% were verbally harassed, 49.3%

⁵⁶ Direct Amparo 6/2008, p.98. Available at:

https://www.scjn.gob.mx/sites/default/files/estrado_electronico_notificaciones/documento/2018-08/ADC-6-2008-PL.pdf

⁵⁷ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/73/152, para. 37. Available at: https://ap.ohchr.org/Documents/dpage_e.aspx?si=A/73/152

⁵⁸ Z. v. Finland, App. No. 22009/93, Judgment, 25 February 1997, para. 96.

⁵⁹ European Commission, Directorate-General for Justice and Consumers, Legal gender recognition in the EU: the journeys of trans people towards full equality, June 2020, Available at:

https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf

⁶⁰ Ibid, page 184.



were physically harassed, 29.9% were sexually harassed, 20.7% left school because of mistreatment, and 10.3% were expelled. According to the survey, "despite many supportive laws and provisions, LGBT people still face societal discrimination in Nepal."⁶¹

42. It follows from the above that data concerning a trans person's former gender identity should be handled with special care. As noted by the Office of the High Commissioner for Human Rights (OHCHR)⁶² and the Committee on the Elimination of Discrimination against Women (CEDAW)⁶³ data processing must be done on the basis of self-identification and with respect to privacy and confidentiality according to principles of relevance, appropriateness and necessity.
43. These principles are echoed by European Court of Human Rights jurisprudence. ECtHR caselaw is clear that, in order to be lawful, the continued handling of a person's data must not only be justified, but respond to a *pressing need*.⁶⁴ Where that pressing need no longer exists, the continuation of data processing becomes a disproportionate interference with the right to privacy.⁶⁵ Insofar as the onward disclosure of a transgender person's deadname is a form of data processing, relevant entities should ensure that the sharing of that data with a third-party – whoever it may be – responds to a pressing need *prior to the disclosure being made*. If it does not, the data should not be disclosed.
44. The "pressing need" approach applies to all forms of data processing, including data retention. In its caselaw relating to data processing in the law enforcement context, the ECtHR has endorsed the independent review of the justification of retention of data according to defined criteria.⁶⁶ The Court's emphasis on the ongoing monitoring of the relevance of data retained, even when this data is processed for public interest purposes such as the prevention of crime, signals the importance for public authorities to actively question the need for holding data in their systems. Accordingly, where the retention or storage of that data no longer responds to a pressing need, that data should be deleted and/or removed from the relevant systems and/or platforms.
45. In light of the serious consequences attaching to the unwanted disclosure of a transgender person's past gender identity, the question of ongoing relevance of the data should be approached with special caution.

2.5 REDRESS AND MITIGATIONS

Comparative experience on the confidentiality of transgender people's information

⁶¹ Ghimire, S., Maharjan, G., and Maharjan, B., Perceived Discrimination and Problems faced by Gender and Sexual Minorities in Kathmandu, Journal of Health Promotion, Vol.7, June 2019, pp. 35-42. Available at:

<https://www.nepjol.info/index.php/jhp/article/download/25493/21307>

⁶² United Nations Office of the High Commissioner for Human Rights, A human rights-based approach to data, 2018, Available at: <https://www.ohchr.org/Documents/Issues/HRIIndicators/GuidanceNoteonApproachtoData.pdf>

⁶³ Committee on the Elimination of Discrimination

against Women, Concluding observations on the combined fifth and sixth periodic reports of Slovakia, CEDAW/C/SVK/CO/5-, Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/389/61/PDF/N1538961.pdf?OpenElement>

⁶⁴ *Catt v. the United Kingdom*, App. No. 43514/15, Judgment, 24 January 2019, para. 119.

⁶⁵ *Ibid.*

⁶⁶ *S. and Marper v. the United Kingdom*, App Nos. 30562/04 and 30566/04, Judgment, 4 December 2008, para. 119.



46. It is not unusual for States to introduce safeguards to protect the confidentiality of a transgender person's former gender. Several gender identity laws around the world protect the confidentiality of transgender people's gender at birth.
47. The Bolivian Gender Identity Law explicitly recognises confidentiality as a key governing principle, stating that information relating to a transgender person's name change should only be disclosed to that person, individuals pre-authorised by the law itself or as a result of a judicial order and/or fiscal requirement.⁶⁷ The Argentine Gender Identity Act similarly restricts the disclosure of any information relating to a transgender person's name or sex marker change. In this regard, the Argentine law creates an exception to the blanket publicity rule applicable to any amendments to the national register, which ordinarily requires name changes to be publicly announced through an official journal.⁶⁸
48. Similar trends can be observed in Europe. In Belgium, the disclosure of any documents mentioning changes relating to a transgender person's recorded gender is prohibited, with exceptions being made for the transgender person's legal representatives and descendants.⁶⁹ In the United Kingdom, it is an offence for a person to disclose information they have acquired in an official capacity about a person's application for a gender recognition certification or about the gender history of a successful applicant.⁷⁰
49. The above-mentioned legislation place meaningful limits on the government's ability to share, advertise or otherwise disseminate information relating to a person's name or sex marker change when it is linked to gender identity. In all of these cases, the relevant legislative bodies deemed it worthwhile to place restrictions on the publicity and transparency of any changes to the civil registry in order to preserve the privacy and dignity of the relevant transgender individuals.

Privacy dimension

50. Privacy caselaw limits the ways in which government entities can process personal data, and suggests a range of safeguards to ensure that the handling of personal data is privacy-observant.
51. Caselaw emerging from the European Court of Human Rights has recognised the need for clear, rapid, transparent, accessible and predictable procedure avoiding any kind of humiliation or suffering in transgender people as they engage with those administrative processes.⁷¹
52. Similar considerations can be applied to the nature of court proceedings. Courts have recognised that an individual's right to privacy may override transparency requirements traditionally applicable to the judicial process. For example, the European Court of Human Rights has accepted that even in cases where there is a high expectation of publicity, it may be

⁶⁷ Article 6, Law 807 on Gender Identity. Available at: <https://sistemas.mre.gov.br/kitweb/datafiles/SantaCruz/pt-br/file/bolivia%20-%20ley%20807%20-%20ley%20de%20identidad%20de%20g%C3%A9nero%20-%2022%20mai%2016.pdf>

⁶⁸ Article 9, Law 26.743 on Gender Identity. Available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>

⁶⁹ Article 2, Law reforming the regimes applicable to transgender persons in relation to the mention of a modification of the recorded sex marker in civil acts and its effects. Available at:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2017062503&table_name=loi

⁷⁰ Article 22, Gender Recognition Act. Available at: <https://www.legislation.gov.uk/ukpga/2004/7/section/22>

⁷¹ European Court Of Human Rights, *Factsheet - Gender identity issues*, Press Unit, May 2022.



necessary to limit the open and public nature of proceedings in order to protect the safety or privacy of individuals participating in the case.⁷² Indeed the Court has affirmed, in a case involving a balancing act between a person's privacy rights and the public interest, the need to attach particular weight to any issues concerning the most intimate aspects of a person's private life which – as the Court explicitly states – includes a person's "sexual definition".⁷³

53. In balance, the approach taken by human rights courts suggests that there are circumstances which may warrant departing from established procedure in order to preserve a person's right to privacy in relation to gender identity.

Caitlin Bishop

Senior Campaigns Officer, Privacy International

caitlinb@privacyinternational.org

⁷² *B. and P. v the United Kingdom*, App. Nos. 36337/97 and 35974/97, Judgment, 24 April 2001, para. 37.

⁷³ *Schlumpf v. Switzerland*, App. No. 29002/06, Judgment, 8 January 2009, para. 104.